

² 5 U.S.C. § 8101 *et seq.*

On appeal, counsel asserts that OWCP's July 13, 2010 decision was "contrary to fact and law."

FACTUAL HISTORY

OWCP accepted that on December 1, 2005 appellant, then a 35-year-old transportation security screener, sustained cervical and lumbar strains, multiple contusions and a displaced lumbar disc without myelopathy when she lifted a heavy suitcase then fell to the floor. Her job required lifting 70 pounds or more and continuous standing for up to four hours. Appellant stopped work on December 1, 2005. At that time, she earned \$593.16 a week. Appellant received compensation on the periodic rolls beginning on January 31, 2006.

Dr. Myron B. Bailey, Jr., an attending Board-certified orthopedic surgeon, held appellant off work from December 1, 2005 through September 2006. On September 26, 2006 OWCP obtained a second opinion from Dr. John P. Sandifer, a Board-certified orthopedic surgeon, who opined that she could perform full-time modified duty, with no repetitive lifting over 25 pounds and sitting and standing no more than six hours a day and not more than 90 minutes continuously. In an October 11, 2006 letter, Dr. Bailey concurred with Dr. Sandifer's restrictions.

On November 22, 2006 appellant accepted the offered position of modified transportation security officer, screening airline passengers and luggage. Duties included monitoring exit lanes, checking boarding passes, directing passengers to waiting stations, instructing passengers in preparing to enter metal detectors and reminding passengers to retrieve their items from detection equipment. These tasks required lifting up to 25 pounds, up to five hours sitting, walking and standing, two hours of reaching, bending, stooping, pushing or pulling and one hour of kneeling. Appellant performed this job from December 4, 2006 to June 1, 2009.

In a February 6, 2007 letter, Dr. Bailey stated that appellant had reached maximum medical improvement as of August 9, 2006. He renewed prior work restrictions.

On June 29, 2007 OWCP obtained current wage information from the employing establishment showing earnings of \$649.86 a week. The current weekly pay rate for appellant's grade and step when injured was \$632.65 a week.

By decision dated July 9, 2007, OWCP found that appellant's actual earnings as a modified transportation security officer fairly and reasonably represented her wage-earning capacity. Appellant had successfully performed the modified transportation security officer position since December 4, 2006, a period longer than 60 days. She earned \$649.86 a week, more than the \$632.65 current weekly pay rate for her job and step when injured. OWCP therefore found that appellant had a zero percent loss of wage-earning capacity.

Dr. Bailey submitted July 9, 2007 and August 13, 2008 progress notes noting that appellant's condition was unchanged.

On June 11, 2009 the employing establishment removed appellant from federal employment as the medical evidence established that she was permanently disabled from her date-of-injury position.

On June 16, 2009 appellant filed a claim for recurrence of disability (Form CA-2a) commencing June 11, 2009 when she was removed from duty and advised that there was no longer any light-duty work available. She also filed a claim for compensation (Form CA-7) claiming wage loss from June 11, 2009 onward.

In a December 4, 2009 letter, OWCP advised that appellant must establish a change in her injury-related condition or a change in her light-duty job such that it no longer met her medical restrictions. It afforded her 30 days to submit such evidence. Appellant submitted two status request letters from her attorney and a schedule award claim.

By decision dated January 14, 2010, OWCP denied modification of the July 9, 2007 wage-earning capacity determination on the grounds that the evidence was insufficient to establish that the accepted conditions had worsened, that appellant had been vocationally rehabilitation or that the original wage-earning capacity determination was in error.

In a January 21, 2010 letter, appellant requested a telephonic hearing, held April 26, 2010. At the hearing, she explained that her modified security officer position required her to check passenger identifications, a task also performed by other employees. Appellant stated that her medical condition did not change or worsen as of June 11, 2009. Counsel asserted that the withdrawal of her light-duty job entitled her to compensation. He also contended that the modified security position was a “made up” job and should not have been used as the basis for the loss of wage-earning capacity determination.

By decision dated and finalized July 13, 2010, OWCP’s hearing representative affirmed OWCP’s January 14, 2010 decision, finding that the July 9, 2007 wage-earning capacity determination did not require modification. The hearing representative found that appellant had not established that her work-related condition worsened such that she “could no longer perform her modified[-]duty job or that she had been retrained or that the original rating was erroneous.”

LEGAL PRECEDENT

Wage-earning capacity is a measure of the employee’s ability to earn wages in the open labor market under normal employment conditions given the nature of the employee’s injuries and the degree of physical impairment, his or her usual employment, the employee’s age and vocational qualifications and the availability of suitable employment.³ A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant’s ability to earn wages.⁴ However, wage-earning capacity may not be based on an odd lot or make-shift position designed for an employee’s

³ *B.M.*, Docket No. 10-1092 (issued April 25, 2011).

⁴ 5 U.S.C. § 8115(a); *Lee R. Sires*, 23 ECAB 12 (1971) (the Board held that actual wages earned must be accepted as the measure of a wage-earning capacity in the absence of evidence showing they do not fairly and reasonably represent the employee’s wage-earning capacity).

particular needs or a position that is seasonal in an area where year-round employment is available.⁵

Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn and not on actual wages lost.⁶ Compensation payments are based on the wage-earning capacity determination, which remains undisturbed until properly modified.⁷ Modification of a standing wage-earning capacity determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was erroneous.⁸ OWCP's procedure manual provides that, if a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss. In this instance, the claims examiner will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity determination.⁹ The burden of proof is on the party requesting modification.¹⁰

When a formal loss of wage-earning capacity determination is in place and light duty is withdrawn, the proper standard of review is not whether appellant sustained a recurrence of disability, but whether OWCP should modify its decision according to the established criteria for modifying a formal loss of wage-earning capacity determination.¹¹ OWCP procedures provide that when the employing establishment has withdrawn a light-duty assignment, which accommodated the claimant's work restrictions and a formal wage-earning capacity decision has been issued, the decision will remain in place, unless one of the three accepted reasons for modification applies.¹²

The Board has held that OWCP may accept a limited period of disability without modifying a standing wage-earning capacity determination.¹³ This occurs when there is a demonstrated temporary worsening of a medical condition of insufficient duration and severity to

⁵ See *James D. Champlain*, 44 ECAB 438, 440-41 (1993); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7a(1) (July 1997).

⁶ *Roy Matthew Lyon*, 27 ECAB 186 (1975). See also *James D. Nardo*, Docket No. 04-2209 (issued May 5, 2005) (following a loss of wage-earning capacity, the employee had surgery related to an accepted injury, then retired. The Board held that compensation for loss of wage-earning capacity was based upon loss of the capacity to earn and not on actual wages lost).

⁷ See *Sharon C. Clement*, 55 ECAB 552 (2004).

⁸ *Sue A. Sedgwick*, 45 ECAB 211 (1993); *Elmer Strong*, 17 ECAB 226 (1965).

⁹ Federal (FECA) Procedure *supra* note 5, Chapter 2.814.9(a) (December 1995).

¹⁰ *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

¹¹ *K.R.*, Docket No. 09-28 (issued September 16, 2009); *Debbie A. Titus*, Docket No. 05-360 (issued June 3, 2005).

¹² Federal (FECA) Procedure Manual, *supra* note 5, Chapter 2.1500.7(A)(5) (October 2005).

¹³ See *Katherine T. Kreger*, 55 ECAB 633 (2004).

warrant modification of a wage-earning capacity determination.¹⁴ This narrow exception is only applicable for brief periods of medical disability. It does not apply to situations where there is a wage-earning capacity determination in place and the employee claims additional wage-loss compensation due to the withdrawal of light-duty work.¹⁵

ANALYSIS

Beginning on December 4, 2006, appellant worked as a modified transportation security officer within the restrictions necessitated by her accepted neck and back injuries. On July 9, 2007 OWCP issued a wage-earning capacity determination based on her actual earnings as a modified transportation security officer. Appellant performed this job through June 10, 2009. On June 11, 2009 the employing establishment sent her home as there was no longer light-duty work available within her medical restrictions. Appellant filed a claim for wage loss commencing June 11, 2009. By decisions dated January 14 and July 13, 2010, OWCP found that she was not entitled to wage-loss compensation because she had not established that the July 9, 2007 wage-earning capacity required modification.

The Board finds that appellant did not establish that the July 9, 2007 wage-earning capacity determination should be modified. As appellant and counsel stated at the April 26, 2010 hearing, she did not allege or establish a change in the accepted medical conditions, her job requirements or that she had been vocationally retrained. Therefore, she did not meet her burden of proof to modify the wage-earning capacity determination.¹⁶ Instead, appellant asserted that the withdrawal of her light-duty job on June 11, 2009 constituted a recurrence of disability entitling him to wage-loss compensation.

As a formal loss of wage-earning capacity was in place on June 11, 2009, the proper standard of review was whether OWCP should modify its July 9, 2007 decision according to the established criteria.¹⁷ Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn and not on actual wages lost.¹⁸ Therefore, the employing establishment's withdrawal of appellant's limited duty on June 11, 2009 was immaterial. Appellant continued to have a capacity to earn wages. Absent a showing that, the wage-earning capacity determination should be modified, she has no disability under FECA and is not entitled to compensation for wage loss when light duty was withdrawn.¹⁹ Accordingly, appellant's argument has no merit.

At the April 26, 2010 hearing, counsel asserted that the original wage-earning capacity determination was in error as it was based on a "made up" job. The Board has held that OWCP

¹⁴ See *Sharon C. Clement*, *supra* note 7.

¹⁵ *K.H.*, Docket No, 08-2392 (issued April 21, 2009).

¹⁶ *Sue A. Sedgwick*, *supra* note 8.

¹⁷ *K.R.*, *supra* note 11.

¹⁸ *Roy Matthew Lyon*, *supra* note 6.

¹⁹ *K.H.*, *supra* note 15.

may not base a wage-earning capacity determination on an odd-lot position.²⁰ The modified-duty job offer appellant accepted described several tasks, including directing and instructing passengers, verifying boarding passes and monitoring exit lanes. Counsel did not submit any evidence establishing that these duties were odd-lot or otherwise “made up.” Therefore, appellant did not establish that the original wage-earning capacity determination was erroneous in that regard.

On appeal, counsel contends that OWCP’s July 13, 2010 decision was contrary to fact and law. As set forth above, appellant did not meet her burden of proof to demonstrate that the standing wage-earning capacity determination should be modified. She did not establish a material change in the nature and extent of the accepted conditions, that she had been retrained or vocationally rehabilitated or that the original determination was in error. Therefore, OWCP’s decisions were proper under the law and facts of this case.

Appellant may request modification of the wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

CONCLUSION

The Board finds that OWCP properly denied modification of a wage-earning capacity determination.

²⁰ *James D. Champlain, supra* note 5.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 13, 2010 is affirmed.

Issued: July 15, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board